Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process	)	WT Docket No. 03-128
	)	
	)	
	)	

ORDER ON RECONSIDERATION

Adopted: December 8, 2009 **Released: December 10, 2009**

By the Commission:

TABLE OF CONTENTS

Heading Paragraph #

I. INTRODUCTION

1. By this Order, we deny the Petition for Reconsideration of the *NPA Report and Order*[1] filed on February 3, 2005, by the Tower Siting Policy Alliance (TSPA).[2] In the *NPA Report and Order,* the Commission adopted and codified the Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (NPA), which governs the review of proposed communications facilities for their effects on historic properties under Section 106 of the National

[1] Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, WT Docket No. 03-128, *Report and Order*, 20 FCC Rcd 1073 (2004) (*NPA Report and Order*), *aff'd*, CTIA-The Wireless Association Ass'n v. FCC, 466 F.3d 105 (D.C. Cir. 2006).

[2] Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, WT Docket No. 03-128, *Petition for Reconsideration*, filed February 3, 2005 (TSPA Petition). The TSPA included, at the time the Petition was filed, American Tower Corporation, Cingular Wireless LLC, SBA Communications, Inc., and T-Mobile USA, Inc.

Historic Preservation Act of 1966 (NHPA).[3] The TSPA does not challenge the NPA as a whole, but it seeks reconsideration of six discrete provisions or sets of provisions within the NPA.

2. For the reasons discussed below, we decline to adopt on reconsideration any of the proposed changes to the NPA that are put forth in the TSPA petition.

II. BACKGROUND

3. Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties included or eligible for inclusion in the National Register of Historic Places (National Register).[4] In order that the Commission may fulfill this statutory obligation, our rules require our applicants to ascertain, prior to certifying compliance with the environmental rules or to constructing the facility,[5] whether their proposed facilities may affect such properties.[6] The NHPA vests the Advisory Council on Historic Preservation (ACHP) with authority to promulgate rules governing the implementation of Section 106.[7]

4. On October 5, 2004, the Commission, the ACHP, and the National Conference of State Historic Preservation Officers (NCSHPO) signed the NPA, which establishes specific procedures for assessing the effects of certain Commission undertakings on historic properties (including historic properties of religious and cultural significance to federally recognized Indian Tribes (Tribes) and Native Hawaiian organizations (NHOs)) under Section 106. The purpose of the NPA is to streamline the generic NHPA review process set forth in the ACHP's rules, 36 C.F.R. Part 800, and to tailor this review for communications towers, antennas, and other Commission undertakings.[8] The NPA was adopted pursuant to Section 800.14(b) of the ACHP's rules, which permits the ACHP and the federal action agency, in consultation with NCSHPO, Tribes and NHOs, and the public, to negotiate a specially tailored programmatic agreement to govern implementation of the Section 106 process for a particular federal program.[9] Upon execution by the ACHP, the federal agency, and, in the case of a nationwide program, the president of NCSHPO, the programmatic agreement takes effect and replaces the Section 106 procedures set forth in Subpart B of the ACHP's implementing rules.[10] The provisions of the NPA have been incorporated into the Commission's rules and are binding on licensees and applicants.[11] Any amendments to the NPA shall be subject to appropriate notice and comment and shall be signed by the Commission, the ACHP, and NCSHPO.[12]

5. In its petition seeking reconsideration of certain provisions of the *NPA Report and Order*,

---

[3] 16 U.S.C. § 470f. The NPA is codified at 47 C.F.R. Part 1, App. C.

[4] 16 U.S.C. § 470f.

[5] *See* 47 C.F.R. § 1.1312(a) (requiring licensee or applicant to initially ascertain whether proposed facility may have significant environmental impact prior to initiation of construction in cases where no pre-construction Commission authorization is otherwise required).

[6] 47 C.F.R. § 1.1307(a)(4). If a proposed facility may significantly affect the environment, either due to its effect on historic properties or for any other reason specified in the Commission's rules, the applicant must prepare an Environmental Assessment and cannot begin construction until the Commission has completed environmental processing. *See* 47 C.F.R. §§ 1.1307, 1.1308, 1.1312, and 1.1317.

[7] 16 U.S.C. § 470s.

[8] *See NPA Report and Order*, 20 FCC Rcd at 1074-75, ¶1.

[9] 36 C.F.R. § 800.14(b).

[10] 36 C.F.R. § 800.14(b)(2)(iii).

[11] 47 C.F.R. § 1.1307(a)(4) and Part I, Appendix C.

[12] NPA Section XII.

the TSPA contends that: (1) the NPA provisions mandating archeological field surveys for most undertakings are burdensome and should be amended;[13] (2) the requirement to invite Tribes and NHOs to participate in considering proposed undertakings within certain exclusions is burdensome and unjustified;[14] (3) the requirement to do more than review records maintained by the State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Officer (THPO)[15] to identify historic properties of religious and cultural significance to Tribes and NHOs that may be visually affected by undertakings is burdensome and unjustified;[16] (4) the standard for protecting the confidentiality of information significant to Tribes and NHOs is overly broad and exceeds the requirements of the NHPA and of the ACHP's rules;[17] (5) the NPA improperly enables consulting parties to block Memoranda of Agreement (MOAs) regarding mitigation of adverse effects;[18] and (6) the NPA should be amended to add a provision for designating a lead agency where more than one federal agency is involved in an undertaking, consistent with Section 800.2(a)(2) of the ACHP's rules.[19]

6. The members of the United South and Eastern Tribes (USET Tribes) filed a Response in opposition to the Petition for Reconsideration.[20] In their Response, the USET Tribes argue that the requirement to perform archeological surveys should remain in effect,[21] notification and participation of Tribes and NHOs under the challenged exclusions should continue,[22] the NPA requirements for identifying historic properties significant to Tribes and NHOs are justified,[23] and the confidentiality provision should remain unchanged.[24] The National Trust for Historic Preservation (National Trust) filed a reply, agreeing with the USET Tribes that the archeological survey requirement should continue in effect, Tribal and NHO participation under the challenged exclusions should not change, and the confidentiality provision is appropriate.[25] The National Trust also disagrees with the TSPA's contention

[13] TSPA Petition at 5-11. *See also Reply to the USET Opposition*, filed by the Tower Siting Policy Alliance, dated April 4, 2005, at 2-6 (TSPA Reply).

[14] TSPA Petition at 13-18; TSPA Reply at 6-8.

[15] In the ordinary case involving non-Tribal lands, the relevant agency is the SHPO for the State in which the proposed construction will be located, and the NPA does not apply on Tribal lands as defined by Section 800.16(x) of the ACHP's rules. However, under the NPA a THPO may, consistent with the ACHP's rules, stand in place of the SHPO where a Tribe has elected to adopt the provisions of the NPA for application on Tribal lands and the Tribe has assumed SHPO functions pursuant to Section 101(d)(2) of the NHPA, 16 U.S.C. § 470(d)(2). A Tribe's authorized representative may act in an equivalent capacity to the SHPO where the Tribe has adopted the provisions of the NPA and the Tribe has not assumed SHPO functions. The NPA uses the term "SHPO/THPO" to cover these situations. *See* NPA Section I.D; *NPA Report and Order*, 20 FCC Rcd at 1131, ¶ 159.

[16] TSPA Petition at 18-20.

[17] *Id*. at 20-21; TSPA Reply at 9.

[18] TSPA Petition at 22-23.

[19] *Id.* at 23; *see* 36 C.F.R. § 800.2(a)(2).

[20] *See Response of the USET Tribes to the Petition for Reconsideration filed by the Tower Siting Policy Alliance*, dated March 23, 2005 (USET Tribes Response). At the time the Response was filed, USET's membership consisted of 24 federally recognized Indian Tribes located in the Eastern and Southern United States, from Maine to Florida to Texas.

[21] *Id*. at 3-5.

[22] *Id*. at 5-7.

[23] *Id*. at 7-8.

[24] *Id*. at 9.

[25] *See Reply by the National Trust for Historic Preservation to Petition for Reconsideration filed by the Tower Siting Policy Alliance*, dated April 4, 2005 (National Trust Reply).

that the NPA enables consulting parties to block mitigation measures, and it opposes the TSPA's proposed lead agency provision.[26] The National Association of Tribal Historic Preservation Officers (NATHPO) and the National Tribal Telecommunications Association (NTTA) filed comments.[27] NATHPO argues generally that many of the delays that the TSPA attributes to provisions for protecting properties of significance to Tribes and NHOs may in fact be due to poor planning by industry.[28] NTTA agrees with the USET Tribes, particularly with regard to archeological surveys and the need for Tribal and NHO participation under certain exclusions.[29] Finally, the TSPA filed a reply to the USET Tribes Response.[30]

III. DISCUSSION

A. Archeological Field Surveys

1. Background

7. Under the NPA, an archeological field survey is required to identify historic resources that may be directly affected by an undertaking unless either (1) the depth of previous disturbance of the ground exceeds the proposed construction depth (excluding footings and other anchoring mechanisms) by at least two feet as documented in the Applicant's siting analysis; or (2) geomorphological evidence indicates that cultural resource-bearing soils do not occur within the project area, or may occur, but at depths that exceed two feet below the proposed construction depth.[31] A "field survey" is defined as a research strategy that utilizes one or more visits to the area where construction is proposed as a means of identifying historic properties.[32] A field survey may be required even though one of the above conditions applies if the SHPO/THPO or an Indian Tribe "provides evidence that supports a high probability of the presence of intact archeological Historic Properties within the APE [Area of Potential Effects] for direct effects."[33] In addition, the NPA states: "The SHPO/THPO, consistent with relevant State or tribal procedures, may specify geographic areas in which no review is required for direct effects on archeological resources...."[34]

2. Petition and Comments

8. The TSPA argues in its Petition that, although the NPA on its face sets forth two exceptions to the requirement to perform an archeological field survey, it in practice requires a Phase I survey in nearly all cases.[35] Nothing in the record of this proceeding, the TSPA continues, justifies such

---

[26] *Id*. at 6-7.

[27] *See National Association of Tribal Historic Preservation Officers Comments*, dated April 4, 2005 (NATHPO Comments) and *Comments of the National Tribal Telecommunications Association*, dated April 4, 2005 (NTTA Comments).

[28] NATHPO Comments at 2-3.

[29] NTTA Comments.

[30] TSPA Reply.

[31] *See* NPA Section VI.D.2.c., i and ii.

[32] *Id*. Section II.A.8.

[33] *Id*. Section VI.D.2.d, e. The APE for direct effects is limited to the area of potential ground disturbance and any property, or any portion thereof, that will be physically altered or destroyed by the Undertaking. NPA, Section VI.C.2.

[34] *Id*. Section VI.B.

[35] The term "Phase I survey" is not defined in the ACHP rules or other authoritative guidance. Although there is no single accepted definition, a full Phase I survey is generally understood to include both an archival study and field work, including some digging of test pits. These strategies fall within what the Secretary of the Interior's Standards (continued....)

burdensome procedures.[36] Before the NPA was signed, the TSPA reports, archeological surveys were required by SHPOs on a case-by-case basis, amounting to less than five percent of all cases.[37] Under the NPA, however, the TSPA argues that Phase I surveys are nearly always required, both because the exceptions apply to only a limited number of cases and because in most instances field work will be necessary to determine whether an exception applies. Such surveys, the TSPA states, may cost anywhere from $1,500 to $6,000 per site, and result in a four to six week delay.[38] This may constitute ten percent or more of a project's overall cost.[39] Moreover, according to the TSPA, archeological surveys, in the vast majority of cases, provide no additional protection to historic properties.[40] In this regard, the TSPA argues that the NHPA does not require perfection in identifying and protecting historic properties, but only a reasonable effort in light of the costs and the likelihood of effects.[41] The TSPA also notes that Section IX of the NPA provides a second level of protection for historic properties by requiring applicants to stop work and notify the Commission, the SHPO/THPO, and Indian Tribes and NHOs if a potentially historic property is discovered during construction.[42]

9. In particular, according to the TSPA, there is no benefit in conducting archeological surveys on paved ground. Indeed, the TSPA alleges, the *NPA Report and Order* appears to conclude that archeological surveys are unnecessary at paved sites in developed areas, but the provisions of the NPA do not exclude these sites from the requirement.[43] The TSPA further notes that the draft NPA on which the Commission sought comment provided that "no archeological field survey shall be required if the Undertaking is unlikely to cause direct effects to archeological sites," and that disagreements about the necessity for an archeological survey could be referred to the Commission.[44] Consistent with the intent of the *NPA Report and Order* and with the draft NPA, the TSPA concludes, the NPA should be amended either to provide "specific guidance" as to when a field survey is unnecessary or to give SHPO/THPOs flexibility to decide case-by-case when a survey is required.[45] In its reply comment, the TSPA adds that a survey should not be required where a qualified expert concludes, based on all the evidence, that there is a low probability of intact archeological resources in the vicinity of the project.[46]

(...continued from previous page)
refer to as "reconnaissance." *See* http://www.cr.nps.gov/local-law/arch_stnds_2.htm. It is less than an "intensive" survey, which involves more thorough shovel testing and excavation. *Id.*

[36] TSPA Petition at 7.

[37] *Id.* at 7-8; TSPA Reply at 2. A few states, including Kentucky, Arizona, and New Mexico, always required surveys. TSPA Petition at 8.

[38] TSPA Petition at 9. The TSPA states that difficult or remote sites may run as much as $8,000 or more. *Id*.

[39] TSPA Reply at 3, n.3.

[40] TSPA Petition at 7-8.

[41] TSPA Reply at 4-5, *citing NPA Report and Order*, 20 FCC Rcd. at 1081-82, ¶21, 1087, ¶35.

[42] TSPA Petition at 6.

[43] *Id.* at 9-10, *citing NPA Report and Order*, 20 FCC Rcd at 1121, ¶ 130 ("Many facilities are placed in locations where the likelihood of affecting archeological resources is remote; for example, on paved ground in a highly developed downtown area. Requiring onsite archeological work in these instances would add substantial delay and cost to facilities deployment to no appreciable benefit.").

[44] TSPA Petition at 9, *citing* Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, WT Docket No. 03-128, *Notice of Proposed Rulemaking*, 18 FCC Rcd 11664, App. A at 11688-89 (2003) (*NPA NPRM*).

[45] TSPA Petition at 10.

[46] TSPA Reply at 5.

10. In opposition, the USET Tribes contend that the provisions regarding archeological surveys should remain in effect, noting that, unless a qualified professional looks at the site before construction, damage to historic properties may result.[47] Indian historic properties are frequently not listed in the National Register, the USET Tribes note. Hence, caution is justified. The USET Tribes note that Tribes may not always require the performance of a Phase I study for each project, but argue that a Tribe should have the option to request that one be conducted.[48]

11. NTTA argues that archeological field surveys are justified in order to protect Indian sites. The requirement to perform these surveys should not have been unexpected, NTTA continues, citing the comments discussed at paragraph 129 of the *NPA Report and Order*.[49] Historic properties of religious and cultural significance to federally recognized Indian Tribes are frequently not listed in the National Register, NTTA notes, because many Tribes are reluctant to disclose the locations of historic properties, or may not know where such properties are located.[50] The National Trust concurs with the USET Tribes and NTTA, arguing that the TSPA fundamentally misunderstands archeological survey techniques when it assumes that qualified consultants will not be able to apply the exclusions without performing intrusive below-ground testing in each case.[51]

12. NATHPO argues that the TSPA's claim that archeological surveys cause undue delay and cost is undocumented. Such costs, if they in fact occur, NATHPO states, are likely the result of poor planning by tower constructors and their consultants.[52] The National Trust agrees that claims of excessive cost, uncertainty, and delay are unfounded.[53]

3. Discussion

13. We decline to change the provisions in the NPA governing performance of an archeological field survey. The draft NPA on which the Commission sought comment provided that no archeological survey would be required if the undertaking was unlikely to cause direct effects to archeological resources, and that disagreements regarding the necessity for an archeological survey could be referred to the Commission.[54] As explained in the *NPA Report and Order*, this approach was rejected in light of commenters' concerns that it left applicants too much discretion to determine when an undertaking would be unlikely to cause direct effects to archeological sites.[55] Although the TSPA complains that the NPA requires a survey in too many instances, it proposes no alternative standard. Rather, it requests either broad discretion for a qualified expert to conclude that there is a low probability of finding intact archeological resources, or else that the Commission provide unspecified "specific guidance." For the reasons explained in the *NPA Report and Order*, we cannot accept such broad discretion.

14. The arguments advanced by the TSPA do not convince us that the archeological field survey requirement is unduly burdensome. In particular, the TSPA provides no support for its contention that a Phase I survey is necessary to determine whether one of the existing exceptions applies, or for its

[47] USET Tribes Response at 4.

[48] *Id*. at 5.

[49] NTTA Comments at 3.

[50] *Id*.

[51] National Trust Reply at 4.

[52] NATHPO Comments at 2-3.

[53] National Trust Reply at 3.

[54] *NPA NPRM*, 18 FCC Rcd at 11688-89.

[55] *NPA Report and Order*, 20 FCC Rcd at 1121, ¶131.

estimates of the cost and delay incurred in performing a Phase I survey. In this regard, we observe that the NPA's definition of "field survey" is broad enough that it need not always involve any particular scope of sub-surface testing. Rather, at any given site, a visual overview or very limited digging (sometimes referred to as a "Phase IA Survey" or "Modified Phase I Survey") may be sufficient to evaluate whether archeological properties are likely to be present.[56]

15. Furthermore, Section VI.B of the NPA provides that a SHPO/THPO, consistent with relevant State or Tribal procedures, may specify geographic areas in which no review is required for direct effects on archeological resources or for visual effects.[57] This provision gives the SHPO/THPO flexibility, where permitted by State or Tribal procedures, to designate geographic areas where an archeological field survey would be inappropriate. For example, a SHPO may determine that a field survey is unnecessary on paved ground in a highly developed area or in other circumstances in which the likelihood of direct effect on archeological resources is remote.[58] Moreover, the TSPA provides no evidence that this scheme is unworkable. Consistent with the Commission's determination when it adopted the NPA, we conclude that the general requirement to perform archeological field surveys, along with the limited objective exclusions and the flexibility accorded SHPO/THPOs to identify areas not requiring field surveys best ensures that the appropriate inquiry will be performed in each case and provides sufficient guidance for an applicant to determine the type of survey required in a particular case.[59]

16. Finally, we are unconvinced that the requirement under Section IX of the NPA to stop work when a previously unidentified historic property is discovered during construction renders archeological field surveys less necessary. While Section IX provides a necessary backstop in cases of error or surprise, it does not satisfy the fundamental requirement under Section 106 to identify historic properties before construction begins. Our processes are reasonably designed to achieve such identification in the ordinary case.

B. Tribal and NHO Participation

1. Background

17. Section III of the NPA outlines various types of undertakings that are excluded from the Section 106 NHPA review process. These exclusions are based upon Section 214 of the NHPA, which authorizes the ACHP to promulgate guidelines under which federal undertakings may be exempted from any provision of the NHPA when consistent with the purposes of the NHPA, taking into consideration the magnitude of the undertaking and the likelihood of impairment of historic properties.[60] For four of the six categories of undertakings described in Section III, the NPA excuses all aspects of Section 106 review,

[56] This is consistent with the general understanding of the term "field survey." *See* http://www.cr.nps.gov/local-law/arch_stnds_2.htm ("field survey" encompasses varying levels of effort, including visual and subsurface reconnaissance techniques as well as more intensive surveys).

[57] NPA Section VI.B.

[58] We also note that such sites may have been previously disturbed to at least two feet below the proposed construction depth, and thus may be excluded from the archeological field survey requirement under Section VI.D.2.c.i.

[59] We emphasize, however, that a SHPO/THPO's conclusion that archeological review at a site is unnecessary for the SHPO/THPO's purposes would not relieve the requirement to provide archeological information to a Tribe or NHO that has determined the information is reasonably necessary to enable it to evaluate whether a historic property of religious and cultural significance to it may be affected. *See* NPA Section IV.F.3.

[60] 16 U.S.C. § 470v.

including participation by Indian Tribes and NHOs.[61]

18. Two of the exclusions, however, fall under a different regime. Specifically, Section III.D excludes from Section 106 review most facilities less than 200 feet in height in an existing industrial park, commercial strip mall, or shopping center that occupies an area of 100,000 square feet or more.[62] Section III.E excludes construction in or within 50 feet of a right-of-way designated and used for the location of similar communications towers or above-ground utility transmission or distribution lines and associated structures and equipment, provided certain conditions are met.[63] Proposed facilities within either of these exclusions must complete the process of participation of Indian Tribes and NHOs pursuant to Section IV of the NPA. If, as a result of this process, the applicant or the Commission identifies a historic property that may be affected, the applicant must complete the Section 106 review process notwithstanding the exclusion.

2. Petition and Comments

19. The TSPA argues that the prerogatives given to Tribes and NHOs under the NPA exceed what they are entitled to under the NHPA and ACHP rules.[64] With regard to exclusions specifically, the TSPA contends the Tribal/NHO participation requirement in the NPA under the industrial area and utility corridor exclusions is unjustified, inequitable, and overbroad. While the TSPA concedes that the Commission and other signatories to the NPA had legal authority to require Tribal and NHO participation under these exclusions,[65] it contends that Section 214 of the NHPA permits exclusion from review where an impact on historic properties is unlikely. It therefore argues that to exclude all aspects of the review, but for the Tribal and NHO review, is inconsistent with the basis for the exclusion.[66] According to the TSPA, there is no reason to presume that historic properties of significance to Tribes are more likely to be affected than other historic properties by construction within these exclusions. The TSPA argues that, while it is true that many Tribal sites are not listed in the National Register, many non-Tribal sites are also unlisted.[67] Moreover, even if unidentified historic properties of significance to Tribes and NHOs were located in these areas, that fact is irrelevant because the exclusion posits that significant effects on any such properties are unlikely.[68]

20. The TSPA also argues that, even if some Tribal participation in undertakings within these exclusions were justified, the provisions in the NPA are overbroad. The TSPA points out that Section III.D already carves out from the industrial area exclusion those instances where a preliminary search of relevant records identifies a historic property within the boundaries of or within 500 feet of the industrial park, strip mall, or shopping center. Similarly, the Section III.E utility corridor exclusion does not apply if the facility would be within the bounds of a historic property. The TSPA argues that even if Tribes and NHOs are permitted to participate, they should be limited to identifying historic properties within the

---

[61] The four exclusions that do not require tribal input include: replacement towers, temporary towers, enhancements to towers, and towers constructed in areas previously designated by the SHPO/THPO as not requiring reviews. *See* NPA Section III.A,B,C,F.

[62] *Id*. Section III.D.

[63] *Id*. Section III.E.

[64] TSPA Petition at 10-13.

[65] TSPA Reply at 7-8.

[66] TSPA Petition at 13-14.

[67] *Id*. at 15-16.

[68] *Id*. at 16; TSPA Reply at 8.

boundaries established by these carve-outs, and not within the standard APE under the NPA.[69]

21. The USET Tribes respond that Section 214 permits an agreement that excludes most aspects of Section 106 review under the industrial area and utility corridor exclusions, while preserving Tribal and NHO participation.[70] This approach is appropriate, the USET Tribes argue, because utility corridors may follow old Indian trails, trading routes, and passes that often contain Indian archeological sites that are not listed in the National Register.[71] Moreover, the USET Tribes contend, the presence of development in an area does not necessarily mean that further disturbance will not have an additional impact.[72] NTTA agrees, emphasizing that Tribal participation only affords the same protection to properties of Tribal significance that the preliminary search of records, required of an applicant invoking either the industrial area or utility corridor exclusion, gives to other historic properties.[73] Ambiguities in laws affecting federally recognized Indian Tribes, the USET Tribes add, must be construed in favor of Tribes.[74] The TSPA responds that under Supreme Court precedent, a preferential reading of Indian laws cannot create new rights that are not expressed in the law.[75]

3. Discussion

22. In the *NPA Report and Order*, the Commission explained that Tribal and NHO participation is necessary under the industrial area and utility corridor exclusions because otherwise there would be a substantial possibility that undertakings within these exclusions would affect properties of traditional cultural and religious importance.[76] With regard to the industrial area exclusion, in order to avoid possible additional effects from new construction on developed properties, the NPA requires a preliminary search of relevant records to identify historic properties within the boundaries of or within 500 feet of the industrial park, strip mall, or shopping center.[77] However, because properties of traditional religious and cultural importance to Indian Tribes and NHOs often are not listed in the National Register or other published sources, comparable protection for these properties could be achieved only by seeking information directly from Indian Tribes and NHOs.[78] The parallel requirement under the utility corridor exclusion is based on similar reasoning.[79]

23. Section 214 of the NHPA provides that: "undertakings may be exempted from *any or all* of the requirements of the [NHPA] when such exemption is determined to be consistent with the purposes of the Act, taking into consideration … the likelihood of impairment of historic properties."[80] Requiring some amount of review before an exclusion can be invoked is therefore consistent with Section 214. Categorically excluding from routine Section 106 review categories of undertakings that are unlikely

[69] TSPA Petition at 16-18; TSPA Reply at 8. Under the NPA, the presumed APE for visual effects ranges from one-half mile to 1 ½ miles, depending on the height of the tower. *See* NPA Section VI.C.4.

[70] USET Tribes Response at 5-7.

[71] *Id*. at 9.

[72] *Id*. at 8-9.

[73] NTTA Comments at 5-6; *see also* National Trust Comments at 4-5.

[74] USET Tribes Response at 6-8.

[75] TSPA Reply at 6-7, *citing, inter alia*, Choctaw Nation of Indians v. United States, 318 U.S. 423, 432 (1943).

[76] *NPA Report and Order*, 20 FCC Rcd. at 1101, ¶77.

[77] *Id*. at 1094-95, ¶56.

[78] *Id*. at 1095, ¶57.

[79] *Id*. at 1098, ¶64.

[80] 16 U.S.C. § 470v (emphasis added).

adversely to impact historic properties promotes the public interest by facilitating the timely deployment of service, conserving historic preservation resources, and providing incentives for applicants to locate facilities in a manner that will render effects on historic properties less likely. However, a properly drafted exclusion must ensure that adverse effects on historic properties are unlikely. While many sites that are not significant to Tribes or NHOs are not listed in the National Register, far fewer eligible Tribal and NHO sites are actually listed, due to the Tribes' and NHOs' concerns about possible looting and other factors. In these circumstances, the Commission reasonably determined that a preliminary search of the relevant records would be insufficient to identify historic properties of religious and cultural significance to Indian Tribes and Native Hawaiian organizations, and that therefore Tribal and NHO participation should be required to invoke either the industrial area or the utility corridor exclusion.

24. As the TSPA notes, the industrial area and utility corridor exclusions require applicants to search relevant records for historic properties within very narrowly defined areas, whereas Tribes and NHOs may identify potentially affected properties anywhere within the APE. This appropriately reflects the Commission's special responsibility to consult with Indian Tribes and NHOs regarding historic properties of traditional religious and cultural importance to them that may be affected by a proposed undertaking.[81] An important objective of the Tribal/NHO participation process set forth in Section IV is to facilitate amicable contacts and voluntary direct discussions through which questions as to the presence of relevant historic properties and effects on such properties may be resolved to the satisfaction of the Tribe or NHO so as to obviate the need for government-to-government consultation or other Commission intervention.[82] This purpose could be stymied unless concerned Tribes and NHOs have the ability to raise with the applicant during this process any matter that might be raised directly with the Commission. On balance, we conclude that the prospect of resolving without Commission intervention potentially contentious cases involving Tribes or NHOs more than offsets any burden to applicants of engaging Tribes and NHOs that may have concerns about potential effects on historic properties beyond the boundaries generally deemed adequate to protect against significant harm to historic properties under these exclusions.[83] Moreover, the more expansive area for identifying potentially affected historic properties of Tribal/NHO concern does not change the criteria for assessing asserted effects, and the proximity of such a property to the undertaking would be an important factor if a Tribe or NHO were to raise concerns as to effects on a property located outside the generally applicable "buffer zone" for either exclusion. Finally, we are not aware that this has been a subject of significant dispute in undertakings subject to the NPA.

25. In sum, we find that Tribal and NHO participation under the industrial area and utility corridor exclusions is necessary to give properties of significance to Tribes and NHOs comparable protection to that afforded to other historic properties, and we therefore decline to reconsider the scope of that participation as provided for in Sections III.D and E of the NPA.

C. Identification of Properties Significant to Tribes and NHOs

1. Background

26. Section VI.D.1.a of the NPA provides that, in identifying historic properties within the APE for visual effects, an applicant generally is required only to review five sets of records that are publicly available from the SHPO/THPO. There is an exception, however, for historic properties of religious and cultural significance to Indian Tribes and NHOs. With respect to these properties, Section VI.D.1.b. provides: "At an early stage in the planning process and in accordance with Section IV of this Nationwide Agreement, the Commission or the Applicant, as appropriate, shall gather information from Indian tribes or NHOs identified pursuant to Section IV.B to assist in identifying Historic Properties of

[81] 16 U.S.C. § 470a(d)(6)(B); *see* NPA Section IV.A.

[82] NPA Section IV.G.

[83] *See NPA Report and Order*, 20 FCC Rcd. at 1095, ¶ 56.

religious and cultural significance to them within the APE for visual effects. Such information gathering may include a Field Survey where appropriate."[84]

2. Petition and Comments

27. The TSPA argues that the NPA's requirement of additional procedures to identify historic properties of cultural and religious significance to Indian Tribes and NHOs is inequitable and unjustified, and that it adds huge costs and delays, including the need to hire qualified professionals to perform site surveys.[85] These requirements, the TSPA contends, were added to the NPA as a result of negotiations to which industry representatives were not a party.[86] The TSPA contends that these burdens are not justified by any special Tribal expertise, particularly in light of ACHP guidance that the Tribes do not have special expertise in applying the criteria of eligibility for the National Register.[87] It also argues that the concerns about confidentiality and privacy that have kept many properties of significance to Tribes and NHOs from being listed on the National Register are not unique to these properties, and that other provisions in the NPA are sufficient to protect such properties.[88] Tribes are entitled to assist in identifying sites and assessing impacts on sites, the TSPA acknowledges, but the provisions in the NPA inappropriately expand their role in a manner inconsistent with federal law.[89]

28. The USET Tribes and NTTA do not address specifically the TSPA's challenge to Section VI.D.1.b. However, they argue generally that the NHPA mandates that the federal government work with Tribes to identify historic properties of religious and cultural significance to them, and that the Tribal/NHO provisions in the NPA simply implement these mandates.[90] The USET Tribes also cite the federal government's trust responsibility to federally recognized Indian Tribes and its obligation to consult on a government-to-government basis with Tribes.[91] The National Trust agrees, asserting that the ACHP has not withdrawn its recognition that Indian Tribes "possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them."[92]

3. Discussion

29. In the *NPA Report and Order,* the Commission explained that review of SHPO/THPO records is insufficient to identify historic properties of traditional religious and cultural significance to Indian Tribes and NHOs, due to both the Tribes' and NHOs' special expertise in assessing the eligibility of such properties and to their confidentiality and privacy concerns about including such properties in publicly available records.[93] Moreover, Section 101(d)(6)(B) of the NHPA provides: "In carrying out its responsibilities under Section 106 of this Act, a Federal agency shall consult with any [Federally recognized] Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties [that may be determined to be eligible for inclusion on the National Register]."[94] In order to

[84] *See* NPA Section VI.D.1.b.

[85] TSPA Petition at 18-19.

[86] *Id*. at 6-7.

[87] *Id.* at 19-20, *citing* 65 Fed. Reg. 77707 (Dec. 12, 2000).

[88] *Id.* at 20.

[89] *Id*.

[90] USET Tribes Response at 5-6; NTTA Comments at 4-5.

[91] USET Tribes Response at 6-7.

[92] National Trust Reply at 4-5, *citing* 36 C.F.R. § 800.4(c)(1).

[93] *NPA Report and Order*, 20 FCC Rcd. at 1119, ¶ 125.

[94] 16 U.S.C. § 470a(d)(6)(B).

evaluate the impact of a proposed undertaking on properties of traditional religious and cultural importance to Tribes and NHOs that may be determined eligible for listing in the National Register, the agency must necessarily first make reasonable and good faith efforts to identify such properties, which may itself require reliance on the knowledge and expertise of the Tribe or NHO. As the ACHP has clarified, while Tribes and NHOs do not have special expertise in applying the criteria of eligibility *per se*, they are uniquely situated to identify historic properties of cultural and religious significance to them.[95] Thus, while clarifying the nature of Tribal and NHO expertise, the ACHP did not amend the applicable regulation, which still mandates that "[t]he agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them."[96]

30. The TSPA's arguments do not persuade us to reconsider the requirements of Section VI.D.1.b of the NPA. As spelled out in the *NPA Report and Order*, due to the special characteristics of properties of religious and cultural significance to Indian Tribes and NHOs, a reasonable and good faith effort to identify these properties requires gathering information from the Indian Tribes and NHOs, and may in some instances require affirmative efforts such as a field survey. Eliminating this requirement would deprive the Commission of Tribal expertise critical to the identification of historic properties of religious and cultural importance to Indian Tribes and NHOs and, as such, impede the agency's ability to take into account the effect of its undertakings on such properties and to do so in consultation with the appropriate Indian Tribes or Native Hawaiian organizations, as required by Section 101(d)(6). Moreover, the TSPA overstates the burden that this requirement imposes on applicants. Essentially, this provision simply requires applicants to follow the Tribal participation process set forth in Section IV of the NPA, which is now typically carried out through the Commission's Tower Construction Notification System. In particular, there is no requirement to hire a professional or perform a field survey unless it is appropriate to do so in a particular case. Accordingly, we decline to make changes to the NPA's provision for identifying historic properties of cultural and religious significance to Indian Tribes and NHOs.

D. Confidentiality of Tribal and NHO Information

1. Background

31. Section 304(a) of the NHPA provides: "The head of a Federal agency or other public official receiving grant assistance pursuant to this Act, after consultation with the Secretary [of the Interior], shall withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the Secretary and the agency determine that disclosure may – (1) cause a significant invasion of privacy; (2) risk harm to the historic resources; or (3) impede the use of a traditional religious site by practitioners."[97] Section IV.I of the NPA provides in relevant part: "Information regarding Historic Properties to which Indian tribes or NHOs attach religious and cultural significance may be highly confidential, private, and sensitive. If an Indian tribe or NHO requests confidentiality from the Applicant, the Applicant shall honor this request and shall, in turn, request

[95] 65 Fed. Reg. 77698, 77706 (Dec. 12, 2000) ("Section 800.4(c)(1) is misleading in stating that tribes have 'special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.' Their expertise is not in applying the criteria of eligibility, it is in identifying some kinds of historic properties and in identifying effects that may not be apparent to others. . . . The Council clarifies that tribal expertise is not in applying the eligibility criteria *per se*, but in bringing a special perspective to how a property possesses religious and cultural significance. This reflects the fact that such Tribes are particularly well placed to provide insights and information on those properties of religious and cultural significance to them. It is common sense to reach out to the Tribes regarding these issues.").

[96] 36 C.F.R. § 800.4(c)(1).

[97] 16 U.S.C. § 470w-3(a); *see also* 36 C.F.R. § 800.11(c) (incorporating this language in ACHP rules).

confidential treatment of such materials or information in accordance with the Commission's rules…."[98]

2. Petition and Comments

32. The TSPA argues that the confidentiality provision of the NPA is broader than the statutory provision and should be narrowed.[99] In particular, the TSPA notes that the statute provides for confidentiality only when disclosure may cause an invasion of privacy, risk harm to a historic resource, or impede the use of a traditional religious site. The NPA, however, directs applicants to honor all Tribal or NHO requests for confidentiality. The TSPA argues that the NPA provision invites abuse by enabling Indian Tribes to assert confidentiality without a valid reason. While the TSPA acknowledges that publicity regarding Tribal sites may result in looting, it is concerned that the NPA would permit assertions of confidentiality for reasons other than protection of historic properties.[100]

33. The USET Tribes respond that a strong confidentiality provision is necessary to protect Tribal sites from damage and avoid looting.[101] The National Trust agrees that the confidentiality provision of the NPA is consistent with law and should be retained.[102]

3. Discussion

34. We are not persuaded that we should limit the confidentiality provision contained in Section IV.I of the NPA. Section 304(a) of the NHPA addresses the authority of federal agencies to withhold certain information from disclosure. It authorizes and directs agencies to withhold information about the location, character, or ownership of a historic resource when the agency and the Secretary of the Interior determine that certain conditions apply. A private party such as an applicant, however, is not in a position to make the determination, in consultation with the Secretary of the Interior, whether the criteria requiring confidential treatment are met. Therefore, if the NPA did not require applicants generally to keep information from Tribes and NHOs confidential upon request, every confidentiality request by a Tribe or NHO might need to be submitted to the Commission for a determination of the effects of disclosure, even where the asserted confidential information would not otherwise ever need to be filed with the Commission by the applicant. Under the circumstances, the broader confidentiality obligation in Section IV.I is a reasonable effort to accommodate the reluctance of Indian Tribes and NHOs to divulge specific information regarding the location, nature, and activities associated with many sites.[103] We note that under the terms of Section IV.I, where information for which a Tribe or NHO requests confidentiality is submitted to the Commission, the Commission's obligation to maintain confidentiality is governed by the Commission's rules. Moreover, an applicant may seek relief from the Commission if it believes a Tribe or NHO is abusing its power to claim confidentiality.

E. Role of Consulting Parties

1. Background

35. Section VII.D of the NPA governs the process to be followed when a proposed undertaking would adversely affect a historic property. Section VII.D.4 provides: "The Applicant, SHPO/THPO, and consulting parties shall negotiate a Memorandum of Agreement (MOA) that shall be

[98] *See* NPA Section IV.I.

[99] TSPA Petition at 20-21.

[100] TSPA Reply at 9.

[101] USET Tribes Response at 9.

[102] National Trust Reply at 5-6.

[103] *See* 36 C.F.R. § 800.4(a)(4); *see also* 36 C.F.R. § 800.2(c)(2)(C) ("Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.").

sent to the Commission for review and execution." Under Section VII.D.5, "[i]f the parties are unable to agree upon mitigation measures, they shall submit the matter to the Commission, which shall coordinate additional actions in accordance with the Council's rules, including 36 C.F.R. §§ 800.6(b)(1)(v) and 800.7."

2. Petition and Comments

36. The TSPA argues that Sections VII.D.4 and VII.D.5 of the NPA, read together, effectively make consulting parties mandatory signatories of MOAs. With this authority, they contend, consulting parties could prevent an MOA from going into effect by simply refusing to sign. According to the TSPA, such a veto is inconsistent with the ACHP rules and contrary to the Commission's intent to streamline the NHPA review process.[104] The National Trust disagrees with the TSPA, arguing that the NPA does not change the important but limited role of consulting parties set forth in the ACHP rules.[105]

3. Discussion

37. Nothing in the NPA or in the *NPA Report and Order* changes the scheme set out in the ACHP rules, under which only the agency, the SHPO/THPO, and the ACHP (if it chooses to participate) are required signatories to an MOA.[106] Although the term "parties" in Section VII.D.5, standing alone, might appear to be ambiguous, in context it does not refer to consulting parties. In particular, Section VII.D.5 expressly references Sections 800.6(b)(1)(v) and 800.7 of the ACHP's rules. Those provisions set out procedures to be followed when the agency and the SHPO/THPO, and the ACHP when it chooses to participate in the consultation, cannot agree on an MOA.[107] The provisions, when read in context with Section VII.D.5, are clear that consulting parties are not required signatories to an MOA and are not empowered to control or veto any term in the MOA. Furthermore, the provisions have not created any ambiguity in practice; the Commission staff has continued to complete MOAs over the objection of consulting parties. Accordingly, we need not reconsider these provisions of the NPA.

F. "Lead Agency" Provision

1. Background

38. Section 800.2(a)(2) of the ACHP rules provides: "If more than one federal agency is involved in an undertaking, some or all of the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with this part."[108] The NPA does not contain any provision addressing responsibilities where another federal agency as well as the Commission is involved in an undertaking, such as when a tower is to be constructed on federal land.

2. Petition and Comments

39. The TSPA urges the Commission to add a "lead agency" provision to the NPA, similar to that contained in 36 C.F.R. Section 800.2(a)(2). The TSPA contends that designating the Commission as the lead agency when towers are proposed on federal lands would facilitate siting of telecommunications

---

[104] TSPA Petition at 21-23.

[105] National Trust Reply at 6.

[106] *See* 36 C.F.R. § 800.6(c). Under this provision, the agency official and the SHPO/THPO, and the ACHP if it chooses to participate, are required signatories; other parties may be invited to be signatories; still other parties may be invited to concur; a party that assumes a responsibility under the MOA should be an invited signatory; but the refusal of an invited signatory or concurring party to sign does not invalidate an MOA.

[107] *See* 36 C.F.R. §§ 800.6(b)(1)(v), 800.7.

[108] 36 C.F.R. § 800.2(a)(2).

facilities.[109] The National Trust argues that the Commission should not be the lead agency in these circumstances because federal agencies with responsibility to oversee public lands have stewardship responsibility over such lands.[110]

3. Discussion

40. The draft NPA on which the Commission sought comment, like the final NPA, contained no provision addressing the designation of a lead agency. This issue was not addressed in the comments, in the *NPA Report and Order*, or at any time during the negotiation of the NPA. Moreover, the Council's rules do not authorize the inclusion or modification of the lead agency provision contained in 36 C.F.R. Section 800.2(a)(2), Subpart A, in a programmatic agreement or other federal agency program developed pursuant to Section 800.14, Subpart C, of the rules.[111] The TSPA's request is thus beyond the scope of this proceeding, and is denied.

IV. CONCLUSION

41. For the reasons discussed herein, we conclude that the challenged provisions of the NPA establish appropriate processes for considering the effects of communications tower and antenna construction on historic properties, consistent with federal law. We therefore deny the Petition for Reconsideration filed by the TSPA in its entirety.

V. ORDERING CLAUSE

42. Pursuant to Sections 1, 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 303(r), 309(j), IT IS ORDERED that the Petition for Reconsideration filed on February 3, 2005, by the Tower Siting Policy Alliance IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[109] TSPA Petition at 23.

[110] National Trust Reply at 6-7.

[111] The Council's rules are divided in three parts: (1) Parties and Participants (Subpart A); (2) The Section 106 Process (Subpart B); and (3) Program Alternatives (Subpart C). Section 800.14 authorizes the development of program alternatives to implement Section 106 as a substitute for all or part of the procedures specified in Subpart B of the rules. *See* 36 C.F.R. §§ 800.14(a) ("An agency official may develop alternate procedures to implement Section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the Act."); 800.14(a)(4) ("Alternate procedures adopted pursuant to this subpart [C] substitute for the Council's regulations for the purposes of the agency's compliance with Section 106, except [when a tribe has assumed THPO functions for tribal lands pursuant to Section 101(d)(5) of the Act]"); 800.14(b)(2)(v) ("If the Council determines that the terms of a programmatic agreement are not being carried out, or if such an agreement is terminated, the agency official shall comply with subpart B of this part with regard to individual undertakings of the program covered by the agreement").